

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 04/28/15;
Decision Issued: 05/04/15; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10568; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10568

Hearing Date: April 28, 2015

Decision Issued: May 4, 2015

PROCEDURAL HISTORY

On December 15, 2014, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy and/or instruction.

On January 12, 2015, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 16, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 28, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its facilities. His duties include operating Agency vehicles in the performance of his duties. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency requires drivers to conduct a pre-trip inspection of dump trucks before using them. As part of that inspection, a driver is to verify:

CHECK SERVICE & PARK BRAKE OPERATION, LEAK & PROPER
ADJUST ***

CHECK BRAKE SENTRY¹

On September 27, 2014, Grievant went to the Yard to obtain a Dump Truck. Grievant conducted a pre-trip inspection of the Dump Truck before driving the truck away from the Yard. Grievant did not note any problems with the truck's brakes. Grievant drove the Dump Truck out of the Yard and began performing his work duties.

Grievant drove the Dump Truck back to the Yard. He parked the truck behind Vehicle 5 on a gradual incline. He got out of the Dump Truck and placed the gear in neutral. He did not activate the air break. By failing to activate the air brake, Grievant left the Dump Truck able to roll. Grievant noticed that the Dump Truck did not have a

¹ Agency Exhibit 2.

chock block² to place behind the wheels of the Dump Truck to prevent it from rolling. He inspected Vehicle 5 and determined it needed anti-freeze. Grievant went to the Garage to obtain anti-freeze and a chock block. While Grievant was away from the Dump Truck, the Dump Truck rolled into Vehicle 5 resulting in damage of approximately \$2,500.

Immediately after the incident, Grievant and the Superintendent attempted to re-create the accident. When the air brake was engaged, the Dump Truck did not move. The Superintendent concluded that the air brake was working properly and that Grievant simply failed to engage the air brake when he left the Dump Truck to walk to the Garage.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”³ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Violation of a safety rule is a Group II offense.⁴ The Virginia Commercial Driver’s Manual provides:

Never leave your vehicle unattended without applying the parking brakes or chocking the wheels. The vehicle could roll, causing injury and damage.⁵

On September 27, 2014, Grievant failed to apply the air brakes to the Dump Truck enabling the Dump Truck to roll into another Agency vehicle and causing damage in the amount of approximately \$2,500. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violating a safety rule. The Agency mitigated the disciplinary action to a Group I Written Notice. The Agency’s discipline must be upheld.

Grievant argued that the air brake was not working properly. The evidence showed that Grievant did not identify any problems with the air brake when he conducted a pre-trip inspection of the Dump Truck. The air brake was working properly

² A chock block is an object in the shape of a triangle placed next to truck tires to prevent them from rolling.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Agency Exhibit 14.

immediately after the incident. No evidence was presented that the air brake on the Dump Truck had ever failed. The evidence is sufficient for the Hearing Officer to believe that the Dump Truck air brake was working properly at all times on September 27, 2014 and that Grievant simply failed to engage the air brake when he went to the Garage.

Grievant argued that he should not be disciplined because he was not negligent. Grievant was negligent because he failed to apply the air brake to prevent the Dump Truck from rolling.

Grievant argued that the discipline was excessive given his record and his practice of keeping his trucks clean and well-maintained. The Agency's discipline was consistent with the Standards of Conduct and not excessive based on Grievant's practices of keeping his trucks well-maintained.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁶ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

⁶ Va. Code § 2.2-3005.

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁷

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.